**COMPETITION WORKING GROUP**
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# ANALYSIS OF U.S. COURT OF APPEALS (DC Circuit) DECISION IN USTA V. FCC: FLAWED REASONING AND DUBIOUS NEW FACTORS COMPLICATE THE REGULATORY PROCESS BUT LOCAL COMPETITION WILL CONTINUE TO DEVELOP

**1. In supporting the Telecommunications Act of 1996, the U.S. Supreme Court's recent decision was a major victory for consumers and competition.**
In Verizon v. FCC, the U.S. Supreme Court clearly understood the objectives and structure of the Telecommunications Act of 1996 and the role unbundling plays in bringing competition and consumer choice. Most notably, the Court emphatically stated that unbundling of ILEC network elements at TELRIC rates promotes competition and deployment of network facilities. This High Court decision establishes the controlling interpretation of the Act which the FCC must follow.

**2. The D.C. Circuit decision is fundamentally inconsistent with the Supreme Court decision, as well as the Act. It complicates the effort to create vibrant local competition, but it does not in any way alter the Supreme Court's specific endorsement of TELRIC pricing and general support for the Act and unbundling.**
The D.C. Circuit's decision could restrict the FCC's authority to continue to adopt and implement a national policy in favor of competition, as Congress directed. However, the competitive industry is confident that it has sufficient evidence to address the requirements set forth by the D.C. Circuit (See #5).

**3. The D.C. Circuit's opinion has little immediate practical effect on the competitive sector.**
The D.C. Circuit left the current unbundling rules in place and remanded them to the FCC for further consideration. As for the line-sharing rule, it was not vacated in the Ordering Clause of the court's decision. ILEC line sharing obligations also are part of contractual commitments and state requirements. Thus competitors will continue to be able to provide DSL services over shared loops. The FCC will deal with all of these issues as part of the pending Triennial Review proceeding.

**4. Many of the new factors set forth in the D.C. Circuit court's opinion are based on flawed reasoning, and the FCC should seek review.**
While the D.C. Circuit does not vacate the unbundled network element rules and competitive carriers will be able to continue operations, the court's decision requires the FCC to address new factors in considering what unbundled elements must be offered. These factors are not based on the Act, pose a challenge to FCC authority and create additional market uncertainty. Supreme Court review would – once and for all – establish the lawfulness of the FCC's method for determining the unbundled elements competitors can access. The alternative is a new multi-year appeals process that would follow in the wake of the FCC's pending Triennial Review.

**5. More than sufficient evidence exists to meet the Act's "impairment" test with the new factors required by the D.C. Circuit.**

The competitive community believes strongly that there is more than adequate evidence for the Commission to conclude that "impairment" exists even with the new factors required by the Court. In addition, states have independent authority to direct the incumbents to provide unbundled network elements.

More specifically, in regard to determining "impairment":

a. Although some competitors may have installed switches and transport facilities, these facilities are limited.

b. The D.C. Circuit did not adopt an "essential facilities" test for determining "impairment", and thus competitors are not limited to accessing ILEC facilities that only have natural monopoly characteristics.

c. As the Supreme Court recognized, use of unbundled elements creates real -- not "synthetic" – competition, especially at a time when capital markets are so constrained.

d. The Supreme Court also recognized – buttressed by ample and very specific evidence submitted by competitors -- that by accelerating competition, the use of unbundled elements leads to greater innovation and deployment of facilities.

e. When all residential service revenues are included, there is no subsidy from business services. Indeed, were it not so, the Bells, for instance, would not have sought and obtained "price cap" regulation in every state and at the FCC for both residential and business services. Thus regulators do not have to be concerned with this factor in ordering access to unbundled elements.

**6. In its Triennial Review NPRM, the FCC is already seeking evidence similar to that required by the Court, e.g. "granularity" of market and product information, and the competitive industry is providing such information.**

In the Triennial Review, CLECs have already presented "granular" evidence that would satisfy the D.C. Circuit. For instance, CLECs submitted compelling, market-specific evidence of impairment regarding the lack of unbundled switching in residential and small business markets, unbundled DSL-capable loops, and interoffice transport. In contrast, the Bells, in their drive to eliminate unbundled elements nationwide, continue to paint with the very broad, "all-market" brush rejected by the D.C. Circuit.

**7. The competitive community is concerned about the FCC's ability to perform on its own the necessary detailed, "granular" fact-finding process.**

As the FCC has already acknowledged, state commissions are generally in a better position to assess state-specific competitive market conditions. State commissions also are better equipped to conduct an inquiry into whether (and to what extent) a particular unbundled network element should continue to be available in that state.